purchasing an article manufactured by the plaintiff, instead of the defendant. The agreed statement of facts does not find that the defendant's label has deceived any one, and I do not think it will do so, but my associates think otherwise, and judgment must, therefore, be returned for the plaintiff.

Judgment for the plaintiff.

RECENT ENGLISH DECISIONS.

Court of Queen's Bench, Hilary Term, January, 1854.[1]

COUCH *vs.* STEEL.

1. There is no implied warranty of seaworthiness in a contract between the owner of a ship and a seaman to serve on board of it for a particular voyage. Therefore, a declaration by a seaman against the owner of a ship for so negligently fitting out the ship, that by reason thereof it was unseaworthy, and plaintiff was unable to sleep in his hammock, and obliged to undergo excessive labor, and was thereby injured in his health, not alleging any knowledge of the unseaworthiness, or any personal blame on the part of the defendant, cannot be supported.

2. By sect. 18 of stat. 7 & 8 Vict. c. 112, every ship navigating between the United Kingdom and any place out of the same, shall keep constantly on board a sufficient supply of medicines, suitable to accidents and diseases arising on sea voyages, and the owner of the ship shall incur a penalty of 20*l.* for every default. By sect. 62, all penalties shall be recovered either in the Superior Courts at the suit of the Attorney-General, or at the suit of any person by summary proceeding and not exceeding one moiety shall be paid to the informer, and the residue to the Seamen's Hospital Society: *Held*, that the penalty was recoverable for a breach of the public duty created by the statute, and that the common-law right to maintain an action in respect of a special damage resulting from the breach of that duty, was not taken away.

The first count of the declaration stated, that before, &c., the defendant, being a subject of her majesty Queen Victoria, was the owner of a certain British registered barque or vessel, called and known as The Persian, which, at the time of the making of the agreement, was in port within this realm, to wit, in the port of

[1] 18 Jur. 515. The arguments of counsel are omitted from want of space.

Plymouth; and the plaintiff, then being a subject of her said majesty Queen Victoria, was then an able-bodied seaman, in good health, duly registered, and had before then provided himself with, and then had, a register ticket, according to the form of the statute in such case made and provided; and thereupon the plaintiff, in his own behalf, and the defendant, by one John Davies, the master of the said barque or vessel of the defendant, and the agent of the defendant in that behalf, made and entered into an agreement in writing, in the form, and containing all the matters and things, and made, entered into, signed, dated and attested in all things as required in and by the statute in that case made and provided, whereby it was agreed by and between the plaintiff and the defendant (amongst other things) that the defendant engaged the plaintiff to serve, and the plaintiff promised to serve, as a seaman in and on board the said barque or vessel from a certain place, to wit, Plymouth, to a certain other place, to wit, Aden, and from the last-mentioned place to a certain other place, to wit, Calcutta, and from the last-mentioned place to a certain other place, to wit, England, for wages and reward to be paid by the defendant to the plaintiff in that behalf, and after the rate of 2*l.* 2*s.* 6*d.* by the month, and for each and every month during the whole continuance of the said voyage, and until up to the arrival in England of the said barque or vessel as last aforesaid. Avermcnt, that he the plaintiff, then being such able-bodied seaman and in good health as aforesaid, did ship himself on board, and serve and go as a seaman in the said barque or vessel of the defendant on the voyage aforesaid, and according to the terms of the agreement aforesaid, and continued so to serve, and was always ready and willing to continue so to serve, and performed and fulfilled the said agreement in all things on his part to be performed and fulfilled, until he was prevented by sickness, caused and procured by the defendant as hereinafter mentioned; yet the defendant so carelessly and negligently managed, fitted out and equipped, the said barque or vessel, that by reason thereof, and of the defendant's neglect and default in respect of the said barque or vessel, the said barque or vessel, at the time of her sailing from Plymouth aforesaid, and commencing the said

voyage, was wholly unseaworthy, and in a leaky and dangerous condition, unfit to be sent or go to sea, and by reason thereof the plaintiff was, during the voyage aforesaid, from Plymouth aforesaid to Aden aforesaid, and from Aden aforesaid to Calcutta aforesaid, unable to sleep in his hammock, and was continually wet, and thereby, and by reason of the excessive and unreasonable labor which the plaintiff was then, and during all the voyage aforesaid, compelled, in consequence of the unseaworthy, leaky, and dangerous condition of the said barque or vessel, to undergo, the plaintiff, during the said voyage, and whilst on board the said barque or vessel, became and was, and continued for a long time, sick, lamed, and disabled, and greatly injured in his health, and was thereby put to and suffered great bodily pain. Second count: That whilst the defendant was such owner of the said barque or vessel as aforesaid, and before and at the commencement and during all the continuance of the said voyage, and after the making of the said agreement, and whilst the plaintiff served on board the said barque or vessel as such seaman as aforesaid, and under the said agreement, the defendant neglected to provide or keep, and made default in providing and keeping, on board the said barque or vessel, a sufficient and proper supply of medicines and medicaments, suitable to accidents and diseases arising on sea voyages, whereby and by reason of such last-mentioned neglect, the plaintiff was unable to be cured of his said sickness on board the said barque or vessel, and suffered great pain and anguish of body and mind. Demurrer and joinder therein. The demurrer was argued in Michaelmas Term (Nov. 15, 1853).

Lord Campbell, C. J.—I am of opinion that the first count cannot be supported. It merely states that the plaintiff was a seaman, that he engaged to serve on board the defendant's ship in a certain voyage, and that the defendant so negligently fitted out the said ship that it was unseaworthy, and the plaintiff was unable to sleep in his berth, and was continually wet, and was compelled to undergo excessive and unreasonable labor, and was injured in his health. It seems to me that this count does not disclose any contract

on which the plaintiff can recover, nor any duty which puts the defendant under an implied obligation to provide a completely tight ship in which the plaintiff was to perform his contract of service. For anything that appears to the contrary, the defendant was ignorant of there being any defect in the ship; and, on the other hand, the plaintiff may have examined the ship, and have become aware of its condition, before the voyage commenced; and moreover, if both parties were aware that the ship was unseaworthy, it might be the intention of the plaintiff, in serving on board a ship where he must undergo more labor and endure more hardships, to obtain higher wages, and so to balance profit against inconvenience. That being so, and there being no scienter in the declaration as to any defect in the ship, nor any allegation of personal neglect in the defendant, he cannot be held liable in this action. If he could, the owner of a ship would be liable to an action at the suit of every seaman on board, if a plank started, or through any act of negligence the ship was not seaworthy within the strict meaning of a policy of insurance. It is admitted that this is an action of the first impression, and there is no dictum which will authorize such a doctrine, nor any principle of law or decided case on which such a doctrine can be founded. Mr. Milward very appropriately mentioned what had been said by Parke and Martin, BB., in *Gibson* vs. *Small*, in the House of Lords, (17 Jur. 1131;) but such a doctrine cannot be deduced from those dicta: they do not assert that the ship, for the purpose of this contract of service, should be absolutely seaworthy within the meaning of that term, in a policy of insurance; and unless that is so, this action cannot be maintained. The authorities, so far as they affect this case, are the other way. Whether the services of a party are engaged in a house or on board a ship, there is not any material distinction between the obligation of the owners, and the doctrine laid down in *Seymour* vs. *Maddox*, 16 Q. B. 326; 15 Jur. 723, and *Priestley* vs. *Fowler*, 3 M. & W. 1, applies to the present case, and shows that this action is not maintainable.

COLERIDGE, J.—I am of the same opinion. It is unnecessary to say what would be the case if special circumstances had existed which

showed fraud or concealment on the part of the master, or a prevention on his part of the seaman acquiring a knowledge of the defects of a ship; there is nothing of that kind in this case. This was a contract for service on board a specific ship on a specific voyage. It is not stated that the seaman was misled in any possible way; and the injury stated to have occurred, might have happened if the ship was fit for the voyage, though not strictly seaworthy within the meaning of the term in a policy of insurance. The plaintiff, in order to maintain this action, must lay down this doctrine—that in all voyages, there is an implied warranty on the part of the owner that the ship is seaworthy. It is almost enough to answer, that we are now in the nineteenth century, and such a claim was never started before the present action. The only authority which has been cited for such a position, are the dicta of two learned judges in *Gibson* vs. *Small*, 17 Jur. 1131. But to give them any weight, even as *obiter dicta*, all the special circumstances which existed in that case must be imported into this; and those dicta stand upon the law affecting a policy of marine insurance, which is a contract *uberimæ fidei*. Upon that ground many things, as the amount of information necessary to be given to the insurer, far exceed what is required between party and party. The cases referred to by Lord Campbell, furnish the true analogy.

WIGHTMAN, J.[1]—The charge against the defendant in the first count is, that he so carelessly and negligently fitted out the ship, that by reason thereof the plaintiff was injured. There is no allegation that the defendant knew of the state in which the vessel was; it is therefore necessary to show that there is an implied warranty of seaworthiness, in a contract between the owner of a ship and a sailor serving on board of it. No authority has been cited to show that there is such an implied warranty. The argument for the plaintiff is founded on the dicta of two of the judges in *Gibson* vs. *Small*, 17 Jur. 1131. The judges there used expressions rather unnecessary for the decision of the case; and it is sufficient to say

[1] Erle, J., had gone to Chambers when this point was argued.

that they are *obiter dicta*, more especially when there is no instance of such an action; and if there had been an implied contract, innumerable instances would have arisen in which an attempt would have been made to enforce it. The cases of *Seymour* vs. *Maddox*, 16 Q. B. 326; 15 Jur. 623, and *Priestley* vs. *Fowler*, 3 M. & W. 1, apply to this case.

Judgment for defendant on the first count. *Cur adv. vult.* as to the second count.

Lord Campbell, C. J., now delivered the judgment of the Court.—The declaration in this case contained two counts, to each of which the defendant demurred. In the first count the plaintiff alleged that the defendant was owner of a vessel called The Persian, and that the plaintiff agreed with the defendant to serve, and that he did serve, as a seaman on board the vessel on a voyage from England to Aden and Calcutta, and that the defendant so negligently fitted out and equipped the vessel, that by reason of such neglect she was unseaworthy, whereby the plaintiff became sick and injured in his health. In the second count the plaintiff alleged, that before, and at the commencement, and during the continuance of the voyage, the defendant, being the owner of the ship, neglected to provide a proper and sufficient supply of medicines suitable to diseases arising on sea voyages, and that by reason of such neglect the plaintiff was unable to be cured of his said sickness, and suffered great pain.

At the close of the argument we expressed our opinion with respect to the first count to be in favor of the defendant, but we reserved our judgment as to the second, as we wished to look more particularly at the acts of Parliament and such authorities as might be found to bear upon the question raised by that count. There is no allegation, in terms, in the second count, of any duty on the part of the defendant to supply medicines for the use of the ship's company; but the plaintiff relied upon the obligation cast upon the defendant by the 18th section of stat. 7 & 8 Vict. c. 112, by which it is enacted "that every ship navigating between the United Kingdom and any place out of the same, shall have and keep constantly

on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, in accordance with the scale which shall be issued by the Admiralty, and published in the London Gazette; and in case any default shall be made in providing and keeping such medicines, the owner of the ship shall incur a penalty of 20*l.* for each and every default." And by sect. 62 it is enacted, "that the penalty may be recovered at the suit of any person, and when recovered shall be applied in part to the informer, and the residue to the Seamen's Hospital Society." By sect. 64 of stat. 13 & 14 Vict. c. 93, the duty of issuing a scale of medicines is transferred from the Admiralty to the Board of Trade; and by sect. 66 the Board of Trade and the Local Marine Boards may appoint proper medical inspectors to inspect the medicines required to be on board. Were it not for the penalty to which the owner of a ship is subject for not providing and keeping on board a supply of medicines, it seems clear that the action would be maintainable. The enactment provides a benefit for the seaman; and according to the plaintiff's allegation in the second count, the defendant has violated this enactment, and thereby the plaintiff, being a seaman on board, was deprived of the benefit, and his health was injured.

The general rule is, that wherever a man has a temporal loss or damage by the wrong of another, he may have an action on the case, to be repaired in damages. (Com. Dig., "Action upon the Case," A.) The Statute of Westminster 2, c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. (See 2 Inst. 486). And in Com. Dig., "Action upon Statute," F., it is laid down, that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute, for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Therefore the simple enactment, requiring the supply of medicines, would have entitled the plaintiff to an action, in the same manner as if the obligation had been imposed by the common law, or had been expressly included in the ship's articles.

However, the 18th section of stat. 7 & 8 Vict. c. 112, which creates the duty, alone makes the party who ought to perform it liable to a penalty for non-performance, to be recovered at the suit of any person, and to be applied in part to the informer, and the residue to the Seamen's Hospital Society. The penalty being annexed to the offence in the very clause of the act enacting it, no indictment or other proceeding could be taken against the person making default for the mere breach of duty cast upon him by the act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for the breach of it, except for the particular mode of punishment by a penalty prescribed by the act. As far as the public wrong is concerned, there is no remedy but that prescribed by the act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy, unless an action on the case at his suit be maintainable; and the question is, whether the penalty annexed to the offence concludes the plaintiff, who has sustained special and particular damage, as well as the public, though no part of the penalty is payable to him.

If the performance of a new duty created by act of Parliament is enforced by a penalty recoverable by the party grieved by the non-performance, there is no other remedy than that given by the act, either for the public or private wrong; but by the penalty given in the act now in question, (7 & 8 Vict. c. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by any body, and no authority has been cited to us, nor are we aware of any, in which it has been held, that in such a case as the present the common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute,) is taken away, by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty.

In a case cited in 1 Roll. Ab., "Action on the Case," M. 16, it appears to have been held, that a person having, without the King's license, imported cards into England, contrary to the stat. 3 Edw. 4, he was not liable to an action at the suit of one to whom the King had granted a license to import cards, paying a rent to the King, and who alleged that he was thereby disabled from paying his rent, as the statute provides that the cards unlawfully imported were forfeited, and the remedy given by the statute ought to be pursued. There, however, the prohibition does not seem to have been intended for the benefit of the person to whom the license was granted, for the damage which he sustained may have been considered as too remote. The case of *Stevens* v. *Jeacocke* (11 Q. B. 731; 12 Jur. 477) is clearly distinguishable from the present. No duty was by the statute, in that case, imposed upon the defendant; he was only prohibited, under a penalty, from exercising the right of fishing to the extent he had it at the common law; he was not bound to perform any particular duty created by the act, but to forbear to do that which but for the act he might have done. The cases cited as authorities for that decision are not applicable to the present case. In *Underhill* v. *Ellecombe* (M'Cl. & Y. 450) it was held, that where highway-rates were payable by the provision of a statute, which perscribed a particular mode for their recovery, that mode only could be pursued; and in *Doe* d. *The Bishop of Rochester* v. *Bridges* (1 B. & Ad. 847) it was held, that a statute having prescribed a particular mode for the recovery of an equivalent for land tax redeemed, no other mode could be adopted for enforcing the payment of the equivalent.

In the present case, if the statute had prescribed a particular mode by which a person sustaining actual damage, by reason of a breach of the duty imposed by the statute, was to receive compensation, undoubtedly that mode only could be adopted; but stat. 7 & 8 Vict. c. 112, has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the act, nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damages arising from the breach of a

public duty, the penalty given by the statute being applicable only to the public wrong, and not to the private damage.

In the case of *Bowning* v. *Goodchild*, (2 W. Bl. 906), an action upon the case was held to be maintainable against a deputy postmaster for a breach of duty in not delivering a post letter, as required by stat. 9 Ann. c. 10, though he was by the same statute liable to a penalty for detaining letters. The objection was taken, but overruled, the Court being of opinion, that though the duty was enacted by the statute, the action lay at common law. In that case, as in this, the penalty was recoverable by a common informer, and not by the party grieved.

Upon principle, then, as well as upon authority, as far as we have been able to find any upon the point, we think the second count is maintainable, and that the plaintiff's right by the common law to maintain an action on the case, for special damage sustained by the breach of a public duty, is not taken away, by reason of the statute which creates the duty imposing a penalty, recoverable by a common informer, for neglect to perform it, though no actual damage be sustained by any one. The multiplication of vexatious actions, which was to be apprehended if we had not held that the first count of the declaration was insufficient, cannot arise from our supporting the second, for the plaintiff cannot recover upon it without proving that the medicines required by the Board of Trade, were not supplied, and that thereby his health suffered; and upon such proof it is fit that he should have a compensation in damages. —*Judgment for defendant on the first count, and for plaintiff on the second.*